In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-213

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS

Petitioners,

v.

METRO BANK OF DALLAS, ET AL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NO. BELOW: 78-2,856

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

OPINIONS BELOW

Respondent accepts statement by Petitioner as presented on page 2, Petition for Writ.

II.

JURISDICTION

Respondent accepts statement by Petitioner as presented on page 2, Petition for Writ.

III.

QUESTIONS PRESENTED

Respondent accepts questions as presented by Petitioner on pages 2 and 3, Petition for Writ.

IV.

PERTINENT TEXTS OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondent would present the following pertinent texts in addition to those presented by Petitioner on pages 3-5, Petition for Writ:

28 U.S.C. Section 1337:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and arises under the Constitution, laws or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. Section 1331:

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade

and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11) or section 219 of part II of such Act (49 U.S.C. 319), only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11) or section 219 of part II of such Act (49 U.S.C. 319), originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or

usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. Supreme Court Rule 19:

1. A review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

* * *

28 U.S.C. Supreme Court Rule 23(1)(h):

A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

28 U.S.C. Supreme Court Rule 23(3):

All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

28 U.S.C. Supreme Court Rule 23(4):

The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

42 U.S.C. Section 1985:

(1) If two or more persons . . . conspire . . .

* * *

(2) . . . if two or more persons conspire for the purpose of impeding . . . in any manner, the due course of justice . . .

* * *

(3) If two or more persons . . . conspire for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . .

V.

STATEMENT OF THE CASE

Respondent accepts statement by Petitioner as presented on pages 6-8, Petition for Writ.

VI. ARGUMENT FOR DENYING THE WRIT OF CERTIORARI

A. The petition for writ of certiorari should be denied because the Fifth Circuit's periodic deciding of appeals without argument or without opinion or without either of them is a permissable practice endorsed by the United States Supreme Court.

Petitioner would lead this Court to believe that the Fifth Circuit's established Summary Calendar procedure for dedeciding cases without merit is a basis for potential disregard of litigants' civil rights. As a matter of practice, nothing could be further from the truth. First, one need look only to the cases in which the Fifth Circuit established their Local Rules 18 and 21 and see the deep concern with which the Fifth Circuit took seriously its responsibility. In *NLRB v. Amalgamated Clothing Workers of America*, 430 F.2d 966, 972 (5th Cir. 1970), Chief Judge Brown emphasized the heavy obligation facing the court in adopting its summary measures, but the court assumed the responsibility for making the proper evaluation and for carefully and selectively utilizing the method. Judge Brown outlined the need for adopting such summary measures because of the vast growing docket, and his reevaluation of the next year in *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York*, 431 F.2d 409, 410-14 (5th Cir. 1970) reaffirmed the need for the summary processes.

In fact, in *Isbell*, Judge Brown noted that the Fifth Circuit system had successfully "passed muster" upon review by the United States Supreme Court in cases that directly attacked the summary procedure for disposition without oral argument. 431 F.2d at 413 *citing United States*

v. Ambers, 416 F.2d 942 (5th Cir. 1969), *cert. denied* 396 U.S. 1039 (1970); In re *Louisiana Loan & Thrift Corp.*, 416 F.2d 898 (5th Cir. 1969), *cert. denied sub. nom. Holahan v. Reynolds*, 397 U.S. 912 (1970). Furthermore, it is apparent that the United States Supreme Court has approved of the summary procedures for disposing of cases without written opinion under the authority of *NLRB v. Amalgamated, supra. See, e.g. Goodman v. United States*, 447 F.2d 944 (5th Cir.), *cert. denied* 405 U.S. 993 (1971); *United States v. Hayes*, 439 F.2d 1127 (5th Cir.), *cert. denied sub. nom. Prentis v. United States*, 404 U.S. 862 (1971); *United States v. Wilkins*, 437 F.2d 1318 (5th Cir.), *cert. denied sub. nom. Scott v. United States*, 402 U.S. 1011 (1971) and *Fauls v. United States*, 402 U.S. 1011 (1971).

The most definitive authority for the propriety of the Fifth Circuit summary practice, particularly for summary affirmances as in the case at bar, is the United States Supreme Court decision of *Taylor v. McKeithen*, 407 U.S. 191 (1972). In *Taylor*, the Court provides the following language:

> We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. *That is especially true with respect to summary affimances.*

407 U.S. at 194 n.4 (Emphasis added). The Court especially noted the docket problems of the Fifth Circuit and gave a specific vote of approval for use of appellate courts' summary disposition by saying:

> The courts of appeal are statutory courts, having the power to prescribe rules for the conduct of their own business so long as those rules are constant with applicable law and rules of practice and procedure prescribed

> by this Court, 28 U.S.C. Sec. 2071. No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all . . . The courts of appeals, and particularly the Fifth Circuit, which has experienced the heaviest case-load of all the circuits, need the maximum possible latitude to deal with the "flood tide" of appeals that the "ever growing explosive increase" of federal judicial business has produced.

407 U. S. 191 at 195-96 (J. Rehnquist, dissenting).

Petitioner refers to the *Taylor* case as authority for his position on Page 24 of his Petition for Writ of Certiorari. Petitioner would show the Court that the Fifth Circuit was admonished for its summary disposition of that case and was directed to write an opinion, but Petitioner still agrees that courts of appeals should have "wide latitude in deciding when and how to write opinions." Respondent, however, would remind Petitioner and urge this Court to note that there are two very basic differences in the *Taylor* case, in which the Supreme Court required a written opinion by the Fifth Circuit, and the case at bar: First, in *Taylor*, the Fifth Circuit had engaged in a summary *reversal of* the district court. Second, the subject matter of the *Taylor* case involved the "fundamental rights" of voting strength among racial minorities by legislative re-apportionment, areas for which private causes of action have plainly been endorsed by the federal courts. *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative apportionment "one-person, one-vote" because of fundamental right of suffrage); *Korematsu v. United States*, 323 U.S. 214 (1944) (race as a suspect criterion); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (racial discrimination, voting as a fundamental political right).

It is the Respondent's position in this case, a position endorsed by the Second Circuit Court of Appeals, that the final judgments of the lower courts — not their judicial rationales — are the matter from which appeals should be taken. Plainly, it is the final judicial deed, not the judicial words, that may constitute legal error if indeed any error ever exists. *Cook v. Hirschberg*, 258 F.2d 56, 57 (2d Cir. 1958). Certainly the Respondent urges that neither the district court in dismissing Petitioner's claim, nor the Fifth Circuit in summarily affirming the district court without argument or opinion has committed any error in judicial deed.

B. The petition for writ of certiorari should be denied because the argument in support of question two (p. 29 et. seq.) contains matter that directly contravenes express Supreme Court rules regarding the contents of the petition.

Respondents contend that the several pages of the petition regarding Petitioner's Question Two are in direct conflict with the following Supreme Court Rules: 28 U.S.C. Rules 19, 23(1) (h), 23(3), and 23(4). Regarding the substantive arguments on the merits, Petitioner has effectively appended a separate brief in support of his petition as prohibited by Rule 23(3). Petitioner has failed directly to allege any of the reasons amplified by Rule 19 as support for his petition, therefore this Court is urged to deny the petition under authority of Rule 23(4).

It is further submitted by the Respondent that Question Two couches an implication that the Respondent bank has been found to have engaged in action constituting "misapplication" or "purloinment" of federally insured funds. Respondent not only denies that its assessment and col-

lection of "hot check" charges is a breach of any criminal sanction, but it also reminds Petitioner that there has been no court determination of any wrongdoing by conducting this activity. It is urged to this Court that to consider whether the F.D.I.C. statutes create an implied action for misapplication or purloinment of federally insured bank deposits is not only untimely but is an improper consideration for this petition in view of the *implicatons* of the conclusory wording of Question Two — implications which have no merit or force at law. Therefore, it is submitted by Respondents that Petitioner, by his inaccurate implications, again has contravened Rule 23(4) and is a sufficient reason for denying the petition.

C. The petition for writ of certiorari should be denied because the District Court properly determined, and the Fifth Circuit properly affirmed the determination that the allegations of plaintiff's Amended Complaint failed to confer federal jurisdiction.

1. A jurisdictional-conferring claim cannot confer federal jurisdiction if it is "unsubstantial" and "devoid of merit."

It is clearly established law that the members of a class cannot aggregate their separate and distinct claims to acquire the $10,000 jurisdictional amount requisite to asserting jurisdiction under the general federal question statute, 28 U.S.C. Section 1331. *See, e.g., Zahn v. International Paper Co.*, 414 U.S. 291 (1973). Petitioner recognized this problem, and thus attempted to circumvent this requirement by alleging claims which would confer jurisdiction without requiring the requisite amount in controversy. The Petitioner failed to recognize, however, that the jurisdictional-conferring claims must have some basis in the law in order to support jurisdiction under a

statute not having an amount in controversy requirement. As stated in the most recent Supreme Court decision on the subject, "(F)ederal Courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion'." (Citations omitted). *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). The jurisdictional-conferring claims asserted by Petitioner are truly "unsubstantial" and "devoid of merit."

2. The jurisdictional-conferring claims under 28 U.S.C. Section 1337 are clearly "unsubstantial" and "devoid of merit" in that no private cause of action is provided for in the statutes allegedly violated and in that the assessment of "hot check" charges does not constitute violation of those statutes.

The first jurisdictional basis asserted in the Amended Complaint is 28 U.S.C. Section 1337. The jurisdictional-conferring claims pursuant to this statute are as follows: 12 U.S.C. Sections 1811-1832; 18 U.S.C. Sections 656, 657, 1005 and 1006. The Amended Complaint does not allege that Sections 1811-32, the Federal Deposit Insurance Corporation Act, create a claim against Respondent, but rather apparently relies on those sections to illustrate that Respondent is an insured bank as that term is defined in Sections 656, 657, 1005 and 1006. The essence of Petitioner's jurisdictional-conferring claims then becomes the assertion that the "hot check" charges constitute the purloinment of bank funds by an officer in an insured bank pursuant to 18 U.S.C. Sections 656, 657, and further that the assessment of the "hot check" charges constitutes a false entry on the books of an insured bank with the intent to defraud an individual pursuant to 18 U.S.C. Sections 1005,

1006. Before elucidating further on the frivolous nature of all of these claims, the first point to recognize is that Section 657 and 1006 only apply to the institutions listed in the statute. A state chartered bank insured under the Federal Deposit Insurance Corporation Act is not included in that list, and, therefore, any claim pursuant to those sections is clearly "unsubstantial" and "devoid of merit." Although Sections 656 and 1005 do apply as to banks insured under the Federal Deposit Insurance Corporation Act, it will be shown below that these jurisdictional-conferring claims are also clearly "unsubstantial" and "devoid of merit."

The first thing to note about the statutes which Respondent allegedly violated through assessment of "hot check" charges is that they only provide for criminal sanctions and do not give a private civil cause of action to an individual. Although Petitioner recognizes this limitation in the statutory language, Petitioner would have this Court imply a private cause of action. The most recent Supreme Court decision on this topic, *Cort v. Ash*, 422 U.S. 66 (1975), sets forth the appropriate analysis to determine when to imply a private cause of action from an otherwise silent statute. In *Cort*, the question presented was whether the shareholders of a corporation which had violated the Federal Election Campaign Act should be given a private cause of action to bring a derivative suit where the Act itself only provided criminal sanctions as a remedy for violation of the Act. Although the Court recognized that there is case precedent supporting the view that a private cause of action can be implied from a purely criminal statute, the Court pointed out that in each of those cases, "there was at least a *statutory basis* for inferring that a civil cause of action of some sort lay in favor of someone."

Id. at 79. (Emphasis added). In concluding that a private cause of action should not be implied, the Court held that when, "there was nothing more than the bare criminal statute with absolutely no indication that civil enforcement of any kind was available to anyone," then a private cause of action would seldom, if ever, be implied. *Id.* at 79-80.

A review of the statutes in question clearly reveals that there is no statutory language that would even hint that a private cause of action was being afforded. Further support is given to this position by the mere fact that Petitioner has made no attempt to point out language within the statute that would indicate that a private cause of action should be afforded. Accordingly, it is clear that under the rule in *Cort*, no private action would lie under the statutes asserted by Petitioner. This conclusion was so apparent to the District Court for the Eastern District of Pennsylvania that it held without any extensive analysis that such sections did not provide a civil remedy. *Jenkins v. Fidelity Bank*, 365 F. Supp. 1391 (E.D. Pa. 1973). Given the undeniably clear state of the law with regard to the right to bring a private cause of action under the statutes claimed by Petitioner, it is obvious that Petitioner's claims are totally "unsubstantial" and "devoid of merit" so that such claims cannot confer jurisdiction pursuant to the holding in *Hagans*.

Even if we assume arguendo that the private right of action does lie under these statutes or that such a claim is not totally frivolous, it is undeniably clear that the assessment of "hot check" charges does not constitute purloinment of funds within the meaning of 18 U.S.C. Sections 656, 657, nor false entry with intent to defraud within the meaning of 18 U.S.C. Sections 1005, 1006. Petitioner never reveals how one could logically conclude

that a "hot check" charge could constitute a type of theft or false entry with intent to defraud when it is conceded by Petitioner that the depositor is given notice of the charge in monthly statements and where it is not alleged that a bank officer is taking the funds for his own personal use. In point of fact, the two cases cited by Petitioner to support a claim under the statutes illustrate that their true scope does not cover the acts complained of herein. *Fidelity Savings & Loan Association v. Aetna Life & Casualty Corp.*, 440 F. Supp. 862 (N.D. Cal. 1977); *First National Bank v. Smith*, 436 F. Supp. 824 (S.D. Tex. 1977). In both of those cases, the funds were embezzled for the personal use of the bank officer embezzling the funds. A review of the language in the statutes in question clearly reveals that it was these types of acts that were to be prohibited by the statutes. It is clear that the statute was not intended to sanction bank officials for assessing charges clearly reported to their depositors which were then placed into the bank's general fund to cover the cost of operation as opposed to acquiring the funds for personal use. The contention that the assessment of a "hot check" charge is an act prohibited by the statutes in question is clearly frivolous. The District Court properly recognized that Petitioner's contentions were clearly "unsubstantial" and "devoid of merit" and thus properly dismissed the claim on grounds that they were not sufficient to support jurisdiction. *Hagans v. Lavine*, 415 U.S. 528 (1974). Further, the Fifth Circuit properly affirmed the District Court's dismissal on this jurisdictional ground.

3. The jurisdictional-conferring claims under 28 U.S.C. Section 1343 are clearly unsubstantial" and "devoid of merit" in that the assessment of "hot check" charges does not constitute a violation of an individual's civil rights.

In order to assert a valid claim under 42 U.S.C. Section 1985, it must be shown that one of the civil rights enumerated in the statute has been violated and that *two or more persons* have conspired to bring about the violation and injury. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). Herein, it is obvious that the assessment of a "hot check" charge does not violate Petitioner's civil rights. This conclusion was so self-evident that Petitioner has been unable to suggest one concrete civil right violated under 42 U.S.C. Section 1985 resulting from the assessment of the "hot check" charge. Furthermore, it is apparent on the face of the Complaint that no conspiracy is present. As stated in *Dombrowski*, "if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute." *Id.* at 196. Accordingly, any claim under this statute is clearly "unsubstantial" and "devoid of merit" such that the claims cannot confer federal jurisdiction.

D. The petition for writ of certiorari should be denied because the District Court properly dismissed the class allegations, and the Fifth Circuit properly affirmed, in that the named plaintiff was not an adequate representative of the class.

Notwithstanding that there are no jurisdictional bases to support any claims in the Amended Complaint, it is also clear that the Amended Complaint, on its face, clearly illustrates that it would not be appropriate to maintain the case as a class action. Charles Ben Howell, named

Petitioner and attorney of record for the class, clearly would have interests adverse and antagonistic to those interests of the other members of the class, because Charles Ben Howell could stand to gain very little as a representative of the class, but could stand to gain a great deal if attorneys' fees, as requested in the Amended Complaint, were awarded by the Court. As noted by the Sixth Circuit in *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976):

> For the same individual to attempt representation of the class as plaintiff and as counsel presents an inherent conflict of interests. Because the financial recovery for reasonable attorney's fees would dwarf the individual's recovery as a member of the class herein, the financial interests of the named plaintiffs and of the class are not co-extensive. If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representatives and of class attorney cannot be played by the same person.

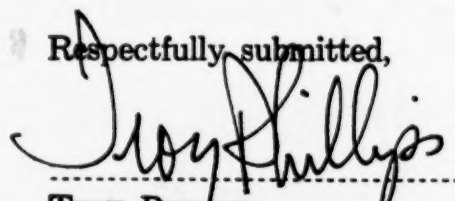
Id. at 1360.

This very sound and rational logic clearly supports the District Court's decision dismissing the class allegations, and constitutes adequate authority for the Fifth Circuit's affirmance of that decision.

VII. CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,



TROY PHILLIPS,
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Dallas, Texas 75201
(214) 651-0500

CERTIFICATE OF SERVICE

I, TROY PHILLIPS, attorney for METRO BANK OF DALLAS, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of September, 1979, I served copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on the parties thereto, as follows:

On CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS, designated Petitioners herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorney of record as follows:

TO: Mr. Howard D. Pattison, Esq.
105 S. Prairieville
Athens, Texas 75751

Troy Phillips

TROY PHILLIPS,
Counsel for Respondent

Baker, Glast, Riddle, Tuttle
& Elliott
40th Floor, 2001 Bryan Tower
Dallas, Texas 75201
(214) 651-0500

AFFIDAVIT:

I, TROY PHILLIPS, an attorney in the offices of Messrs. BAKER, GLAST, RIDDLE, TUTTLE & ELLIOTT, attorneys of record for METRO BANK OF DALLAS, Respondent herein, depose and say that on the 8th day of September, 1979, I served copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS, Petitioner herein, by delivering the same by first-class postage pre-paid mail to Mr. Howard D. Pattison, Esq., counsel of record for said Petitioner located at 105 S. Prairieville, Athens, Texas 75757.

Troy Phillips

TROY PHILLIPS

SUBSCRIBED AND SWORN TO BEFORE ME, at Dallas County, Texas, this 8th day of September 1979.

Gerri Robertson

Notary Public in and for
Dallas County, Texas
GERRI ROBERTSON

My Commission Expires:

7-6-81